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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD TORRES VALLE,

Defendant and Appellant.

F074256

(Kern Super. Ct. No. LF10908A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. David R. Zulfa, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Donald Torres Valle drove his nephew, Milton Moncada, to a field and accused him of harassing his wife and destroying his family. Defendant assaulted Moncada by repeatedly hitting him in the face and head with a beer bottle, attacking him with a sharp object that was possibly a box cutter, trying to run down Moncada in his truck, and using a broken beer bottle to inflict even more blows and lacerations to his head and body. Moncada tried to defend himself but suffered a broken nose and multiple cuts and abrasions on his face, neck, chest, and back. Defendant only stopped the attack when a friend who was present, but not participating in the assault, warned him that someone might drive by, see what was going on, and call the police. Defendant broke Moncada's cell phone, threatened to kill Moncada and his family if he reported the incident to the police, and left him in the field.

At trial, defendant testified that they argued in the field about whether Moncada was harassing defendant's wife, they pushed each other and fought, and defendant tried to walk away. Defendant further testified that Moncada pulled a knife and attacked him, and defendant used a beer bottle to defend himself.

Defendant was convicted of attempted premeditated murder, assault with a deadly weapon, and dissuading a witness, with enhancements for great bodily injury and personal use of a deadly or dangerous weapon.

On appeal, defendant contends there is insufficient evidence to support his conviction for attempted murder because the People failed to prove beyond a reasonable doubt that he did not act in perfect or imperfect self-defense, or in the heat of passion upon a sudden quarrel.

Defendant also challenges the evidence in support of the jury's finding of premeditation and deliberation for attempted murder. Defendant further argues there is

insufficient evidence to support the great bodily injury enhancements because Moncada's injuries were moderate.

Defendant raises two instructional issues: that an instruction on consciousness of guilt violated his due process rights, and the court improperly gave the mutual combat instruction because it was not supported by the evidence.

Finally, defendant raises three claims of prosecutorial misconduct in closing argument. Having failed to object to these claimed instances of misconduct, we will review his assertions under his alternative claim of ineffective assistance.

We affirm.

FACTS

Milton Moncada, the victim in this case, was the prosecution's primary witness and testified about the circumstances surrounding the charged offenses.

Moncada lived in Arvin with his girlfriend. Defendant and his wife also lived in Arvin.

The text messages

Moncada testified that at some point in 2015, defendant's wife started to send text messages to him that he described as "flirtatious. She was flirting with me." Moncada initially ignored her messages, but eventually responded, and asked her to "calm down, to not be playing with those sort of things." Moncada testified they subsequently shared "a few kisses" that were "mutual," but they did not have sexual relations. Defendant's wife told Moncada she was with "in love" with him. Moncada was embarrassed about the situation and did not tell his girlfriend about it.

Moncada testified that between the time he kissed defendant's wife and the incident in this case, he went to defendant's house more than once to hang out and have fun. Defendant did not talk to him about his wife.

Moncada and defendant pay the insurance premium

Defendant and Moncada had a joint insurance policy for their vehicles. Around 10:30 a.m. on January 23, 2016, Moncada drove to defendant's house to give him the insurance premium, as he had previously done. Moncada testified this was about five or six months after defendant's wife had started sending him the text messages.

As Moncada headed to defendant's house, he drove by the home where defendant's brother lived in Arvin. He saw defendant outside and stopped there. Defendant was with a friend that Moncada only knew as "Chocolao," who was later identified as Victor Garcia.

Moncada gave defendant the money for the insurance premium. Defendant said he had forgotten to pay it and asked defendant to accompany him to the insurance office in Bakersfield, as they had done in the past. Moncada agreed.

Defendant got into the driver's seat of a Ford truck that belonged to his brother. Chocolao sat in the front passenger seat, and Moncada sat in the back seat. Defendant stopped at a gas station and bought a bottle of Gatorade and six bottles of beer. Defendant and Chocolao drank the beer, and Moncada drank the Gatorade.

When they arrived in Bakersfield, defendant went into the insurance office and paid the premium while Moncada and Chocolao waited in the truck.

Defendant drives into the field

Moncada testified defendant drove away from the insurance office and Moncada thought they were going back to Arvin. Defendant got on Highway 99 and took a different route than he used to get to Bakersfield. Moncada asked defendant where they were going. Defendant said the truck had been recently been repaired and he wanted to test it.

Defendant turned onto Interstate 5, then took the offramp to the outlet stores on Laval Road in Tejon. Defendant drove past the stores and continued to an area surrounded by grape fields.

Moncada testified that defendant stopped the truck in a dirt area by the fields, about 15 minutes away from the outlet stores. He believed they were about 15 to 20 miles from their homes in Arvin.

Defendant and Chicolao got out of the truck to relieve themselves. Moncada tried to get out of the truck so he could smoke a cigarette, but the back door would not open. Defendant returned to the truck and released the child safety latch on the back door so Moncada could get out.

Defendant's behavior toward Moncada

Moncada testified that defendant had been friendly to him up to that point. There was nothing to indicate defendant was angry or upset with him. Moncada testified he never agreed to fight with defendant at any time that day.

Moncada further testified that during the drive from Arvin to the insurance office, defendant and Chicolao talked with each other, and Moncada was texting on his cell phone. Moncada stopped texting after defendant drove away from the insurance office and headed to the outlets.¹

Defendant confronts and assaults Moncada

Moncada testified he stood near the back of the truck with defendant, who was drinking a bottle of beer.

Defendant started talking about his wife. He accused Moncada of sending texts to his wife, flirting with her, and accosting and harassing her. Defendant said Moncada had destroyed his family. Moncada denied defendant's accusations and said he had not harassed his wife and there was nothing physical between them. Moncada testified

¹ In his opening brief, defendant states that Moncada was texting with defendant's wife while he was in the truck and argues defendant's knowledge of that activity supported a defense based on heat of passion/provocation.

As we will discuss below, there is no evidence that while he was a passenger in the truck, Moncada was texting or communicating with defendant's wife, or that defendant believed he was doing so at that time.

defendant asked him the same questions two or three times, and Moncada denied his accusations.

As they talked behind the truck, Moncada became distracted and looked away from defendant. Moncada testified defendant suddenly “lunged” at him and hit him on the right side of his head, above the ear, with the glass beer bottle that he had been holding.

Defendant held Moncada with one hand and hit Moncada in the head with the beer bottle about five times. Moncada testified defendant hit him “[w]ith all his might.” Moncada raised his hand and blocked some of defendant’s blows, but the bottle still hit his head and did not break.

Moncada testified he fell as defendant continued to hit him with the beer bottle. Defendant fell on top of him and let go of the bottle. Defendant repeatedly hit Moncada’s head, face, and lip with his fists. Moncada did not hit defendant and tried to cover himself for protection.

Moncada testified he pushed defendant away, got up, and tried to run from him. Defendant followed Moncada, grabbed his sweater, and pulled him back. Moncada fell, and defendant again hit Moncada in the face with his fists.

Moncada testified that as defendant attacked him, Chicolao stayed by the front of the truck. Chicolao was “really plastered,” and he could barely stand up.

Defendant produces the “cutter”

Moncada testified defendant slipped down, and Moncada was able to get up. Moncada testified defendant pulled an object from his pocket that he described as “a blade – a cutter, like to cut paper.”

On cross-examination, defense counsel asked Moncada about the object that defendant produced. Moncada testified defendant “pulled out the knife.”

“Q. Did [defendant] strike you with a box cutter?

“A. I do not understand what that is.

“Q. Did [defendant] strike you with a knife?

“A. Yes.

“Q. And is it a knife or is it something that you use to cut boxes?

“A. It’s like to cut boxes.”²

Moncada testified defendant grabbed his right shoulder and tried to “stab” him in the chest with the “cutter.” Moncada grabbed “the cutter” by the blade with his hand. The sharp object cut three of Moncada’s fingers. Defendant put the cutter back in his pocket but held onto Moncada’s shoulder.

Moncada testified he again tried to run away. Defendant grabbed the hood of his sweater and pulled him back. Defendant rolled the sweater around Moncada’s neck and tried to choke Moncada with it, and Moncada could not breath normally.

Defendant follows Moncada in the truck

Moncada testified he took off his sweater, broke free from defendant, and ran away. He looked back and saw defendant run to the truck. Defendant got into the driver’s seat. Chocolao was already sitting in the passenger seat.

Defendant started the truck and followed Moncada. Moncada ran toward the fields. Moncada testified he believed he was going to die because he had nowhere else to run, and defendant was following him in the truck.

Defendant kept driving and the truck hit Moncada’s side by his ribs. Moncada fell, but he was not injured when the truck hit him.³

² As we will explain below, defendant disputes the People’s claim that he used a knife or sharp object to assault Moncada.

³ At trial, Moncada testified the left side of the truck hit his right side by his ribs, and he did not know how fast the truck was going when it hit him. He could not remember his prior testimony on this subject.

The parties stipulated that Moncada had testified at a pretrial hearing that the truck was going about 30 to 40 miles per hour and the right side of the truck hit him.

Defendant attacks Moncada with the broken beer bottle

Moncada testified defendant stopped the truck after he fell down. Moncada ran behind the vehicle to get out of the way. Moncada heard defendant open the truck's door and break a beer bottle. Defendant got out of the truck and ran after Moncada. Defendant held the neck of the broken beer bottle. Moncada felt dizzy and faint from the blows that had already been inflicted to his head, and he could not run away from defendant.

Defendant caught Moncada and attempted to slash his neck with the broken beer bottle. Moncada tried to "parry" defendant's blows with the broken bottle, but he could not get away. Defendant held onto Moncada's shirt and cut his left shoulder and neck with the broken bottle. Moncada tried to run away and defendant ran with him. Moncada took off his shirt and fell. Defendant got on top of Moncada. He lunged at Moncada with the broken bottle and cut the left side of his ribs and the center of his back; defendant kicked Moncada in the forehead and above his eye.

Defendant threatens Moncada and leaves

Moncada testified that Chicolao left the truck and pulled defendant away from him. There were cars driving by the field, and Chicolao warned defendant the drivers were going to call the police and they needed to leave. Defendant finally got off Moncada.

Moncada realized his cell phone had fallen out of his pocket and saw it on the ground. When Moncada tried to pick it up, defendant grabbed the cell phone and broke it.

As we will discuss below, defendant argues the entirety of Moncada's testimony lacked credibility because his account of the truck's speed and how it hit him was inherently improbable.

Defendant told Moncada that he would kill him and his family if he talked to the police. Defendant said he knew some people who would kill him, and that he had a tomb ready for him.

Moncada testified he believed defendant's threats because "[h]e tried to kill me. How was I not going to believe him."

Defendant got back into the truck and drove away with Chicolao; he left Moncada in the field.

Moncada's injuries

Moncada walked to a ranch and asked for help. The police and paramedics were called. Around 1:00 p.m., Moncada was taken to Kern Medical Center and treated for the injuries that defendant inflicted with the intact and broken beer bottles, the "cutter," and his fists and feet.

Moncada testified he suffered abrasions and injuries on his arm, eye, eyebrow and eyelid, face, forehead, lip, ear, neck, torso, and back. He also had a broken nose. He had cuts on his neck, three fingers, and below his eyebrow; his right and left shoulders; his right side; and multiple cuts on his left side, torso, and ribs. Many of the cuts required stitches, including the injuries around his eye, and left scars on his body. The prosecution introduced photographs of Moncada's injuries and wounds.

Moncada's first statement to the police

Around 8:00 p.m., Arvin Police Officer Caudillo responded to the hospital and spoke to Moncada about what happened to him. Caudillo observed bruises on his face. Moncada said he had been kidnapped in Arvin by unknown people who dragged him into a Nissan, an unknown man pulled a blade, they covered his eyes while they were traveling, they took his wallet and cell phone, and they assaulted him and left him in the field. Caudillo testified Moncada seemed "really nervous" as he gave his statement.

At trial, Moncada testified he lied to the police at the hospital because he had not yet contacted his family, and defendant had threatened to hurt his family if he told the police what happened.

In the meantime, Moncada's family had been worried because he had been missing for several hours and his cell phone was not on. They contacted the police around 9:00 p.m. and did not get any information. Around 10:00 p.m., the police called Moncada's family and reported he was at the hospital. Moncada also called his family after he was treated in the emergency room and gave his statement to the police.

Moncada's second statement to the police

Around 10:00 p.m., Moncada's mother and girlfriend arrived at the hospital to pick him up. Moncada testified that once he saw his family, he realized they were safe, and defendant had not hurt them. Moncada told his family to take him directly from the hospital to the Arvin police station because he was going to tell them the truth about what happened.

At 10:34 p.m., Moncada arrived at the Arvin Police Department with his family and met with Officer Caudillo and Sergeant Stewart. Caudillo testified defendant seemed "almost remorseful for having told me one story" at the hospital. When he met with the officers at the police department, Moncada reported that defendant was the person who attacked him in the field.

The case was transferred to the Kern County Sheriff's Department, and Moncada was interviewed by Deputy Hernandez. Moncada said that he went with defendant and Chocolao to pay the automobile insurance and the incident happened on the way back. Moncada said he told defendant that nothing was going on with his wife. Moncada said he was hit in the back of the head and fell. Defendant got on top of him and hit his head eight to 10 times with the glass beer bottle. Moncada said he tried to get away and defendant pulled a "box cutter." Moncada said he was hit in the back with a rock. Moncada fell and defendant got on top of him. Defendant hit him in the head and kicked

his face. Moncada said he again tried to get away. Defendant got back in the truck and hit him with the front bumper. Defendant got out of the truck, broke a beer bottle against a tree, and repeatedly hit Moncada's back with it.

At trial, Moncada testified he never agreed to fight with defendant that day. He did not have a knife or any other weapon. During the entire incident, he never tried to hit, punch or kick defendant. He kept trying to protect himself and get away and pushed defendant to break free.

Arrest of defendant

On January 24, 2016, the day after the incident, Deputy Hernandez arrested defendant. Defendant's wrists were slightly swollen. He had a bandage on his left hand that covered some cuts and a small laceration on his thumb that was slightly swollen. The paramedics were called to examine defendant's hand, and there was dried blood under the bandage. He was taken to the hospital for further treatment of his hand.

Evidence at the scene

After defendant was arrested, Deputy Hernandez drove Moncada to Laval Road to look for the crime scene. Moncada showed him the field where defendant had stopped the truck. Hernandez testified it was a rural area surrounded by vineyards, about seven to 10 miles from the Laval Road outlets in Tejon, and 15 to 20 miles from Arvin. There were multiple tire tracks in the dirt.

Deputy Hernandez testified they found several items on the ground that Moncada identified: Moncada's sweater and shirt that he took off as defendant assaulted him; Moncada's keys and cigarettes that fell out of his sweater; Moncada's hat that fell off when defendant hit him with the intact beer bottle; Moncada's broken cell phone; an intact glass beer bottle and part of a broken bottle, consistent with the type defendant had purchased at the gas station; and the sandals that defendant had been wearing that day.

DEFENDANT'S TRIAL TESTIMONY

Defendant testified at trial to a different version of events.

Defendant's initial questions to Moncada

Defendant testified that about a week before the incident in this case, his wife said that Moncada had “tried to abuse her.” Defendant spoke to Moncada’s mother and father about what his wife said. Defendant saw Moncada the day before the incident and tried to talk to him about it. Moncada’s mother was present, and Moncada said they could talk about it later when they were by themselves.

Defendant drives to Bakersfield

On the morning of the incident, defendant was at his brother’s house in Arvin and working on the Ford truck. Chicolao arrived; he was defendant’s “close” neighbor and the brother of Moncada’s stepfather.⁴

Moncada arrived to pay the premium on their joint insurance policy. Defendant told them he wanted to test drive the truck. Defendant had planned to go with Chicolao to pay the insurance, and Chicolao invited Moncada to join them.

Defendant testified he drove the truck, Chicolao sat in the front passenger seat, and Moncada sat in the back seat. On the way to Bakersfield, defendant stopped at a store, and defendant and Chicolao got out of the truck. Chicolao bought a Monster drink, Gatorade, and a six-pack of beer. Defendant testified that during the rest of the drive to the insurance office, Moncada was texting in the backseat.⁵

Defendant drove to the insurance office and did not drink any beer. Defendant went into the office by himself, paid the premium, and returned to the truck.

⁴ There is no evidence that Victor Garcia, also known as “Chicolao,” was interviewed about the incident, and he did not testify in this case. Deputy Hernandez testified that after defendant was arrested, Moncada’s mother reported that Garcia was at their house and talking about the incident. When Hernandez arrived, he determined that Chicolao was drunk.

⁵ As we will discuss below, defendant argues on appeal that Moncada was texting with defendant’s wife during the drive. At trial, however, Moncada did not testify who he was sending text messages to when he was in the truck. Defendant testified that Moncada was texting during the drive, but there is no evidence that defendant believed Moncada was texting with his wife at that time.

Defendant drives to the outlet stores

After he finished at the insurance office, defendant asked Chicolao and Moncada if they wanted to go anywhere else. Chicolao said he wanted to go to a store, and they agreed to go to the outlet stores at Tejon.

Defendant testified he drove on Highway 99 and took the Laval Road offramp to the outlet stores. He drove through the parking lot, but they did not get out of the truck. Defendant initially testified that it looked like the stores were not open. On cross-examination, he admitted the stores were open, but it looked like no one was around.

Defendant left the stores and continued driving to Arvin. He stayed on Laval Road and stopped in a field because they needed to relieve themselves. Defendant testified that he and Chicolao had each consumed one beer by that time. Moncada was not drinking beer.

Defendant asks Moncada about his wife

Defendant and Chicolao got out of the truck. Moncada could not get out. Defendant testified the child safety latch had been locked on the backdoor because his brother had a small child. Defendant unlocked the latch on the backdoor so Moncada could get out.

Defendant and Moncada stood outside the truck, smoked cigarettes, and talked. Chicolao was not standing with them.

Defendant testified that he asked Moncada twice if he “really tried to abuse” his wife, and why he did it. Moncada denied that he did anything to his wife. Defendant asked Moncada these questions because he was trying to “resolve the problem” with his wife.

Defendant and Moncada argue

Defendant testified “we started arguing” and “then we started insulting” each other. Defendant said something insulting about Moncada’s mother.

“[Defense counsel]: Okay.

“[Defendant]: And then he pushed me, I pushed him, and then we began throwing blows.

“Q. And so he pushes you, you push him, you guys are fighting each other?

“A. Yes.

“Q. How are you fighting? With fists or wrestling? What are you guys doing?

“A. Fists.”⁶

Defendant testified Moncada hit his body multiple times and defendant blocked the blows with his arm. They fought like this for about five or eight minutes, and then they both ended up on the ground.

“[Defense counsel]: And how did that happen?

“A. We grabbed each other. I had two sweatshirts [on]. He also had a sweatshirt [on] and we were wrestling.

“Q. Okay. At any – and that’s how you guys fell to the ground?

“A. Yes.”

Defendant testified they kept wrestling on the ground until Chicolao arrived. Chicolao picked up defendant and separated him from Moncada. Defendant told Chicolao “that this problem was only between [Moncada] and me and then I saw that [Moncada] was bleeding” from the eyebrow and lip.

Chicolao let defendant go, but “we didn’t continue throwing blows at one another.” Defendant saw Moncada’s cell phone on the ground. Defendant picked up the cell phone and broke it against a post in the field.

⁶ As we will explain below, the court instructed the jury with CALCRIM No. 3471 on mutual combat; defendant contends on appeal the instruction was not supported by the evidence.

Moncada pulls a knife

Defendant testified that after he broke Moncada's cell phone, "everything stopped," and he decided to leave. Defendant walked to his truck but, Moncada pulled a knife from his pocket.

Moncada advanced on defendant with the knife. Defendant went to the truck and grabbed a beer bottle. Moncada kept coming towards defendant. Defendant ran to the other side of the street to get away from Moncada. Defendant broke off the bottom half of the beer bottle on a metal post.

Defendant held the neck of the broken bottle, confronted Moncada, and told him to let go of the knife or they were both going to end up injured. Moncada refused. Defendant testified Moncada lunged at him twice with the knife and cut the chest area of defendant's sweatshirt.

Moncada held the knife in his right hand. Defendant held the broken bottle in his right hand and grabbed Moncada's right wrist with his left hand. Defendant and Moncada stood face-to-face, their arms were around each other, and they wrestled over the weapons. Defendant told Moncada to let go of the knife, but Moncada refused. Defendant testified he "scratched" Moncada's left side with the broken bottle two or three times, but he did not try to stab him with it.

As they struggled, Moncada cut defendant's left hand with his knife. Defendant was hurt and let go of Moncada's right hand; defendant threw away the broken bottle.

Defendant tripped Moncada with his foot, threw him to the ground, and they both fell. Defendant opened Moncada's fingers and got control of the knife. Defendant pulled the knife out of Moncada's hands and the knife cut Moncada's fingers. Defendant threw away the knife into the field.

Defendant ran to his truck, Chocolao got in, and defendant drove away. He left Moncada in the field. Defendant also left Moncada's knife on the ground.

Defendant's actions after the incident

Defendant testified he drove home and did not tell anyone about the fight with Moncada. Defendant did not call the police because he did not think it was a “serious thing.”

Defendant washed down and cleaned his brother's truck because there was blood on it. He threw away his torn sweatshirt in the trash at his house because it was full of his blood. There were still four bottles of beer left over, and either defendant or his brother threw them away.

Defendant testified that the day after the incident, he cut his left hand and broke a finger on that hand in an accident at work, when a coworker slammed his hand in a door. He did not seek treatment for his injuries before he was arrested.

Defendant's postarrest statements

Defendant testified that after he was arrested, he told Deputy Hernandez that he injured his left hand at work. Defendant also said that he and Moncada were the only people in the vehicle when the incident happened. Defendant did not mention Chocolao because he “didn't have anything to do with the fight,” and he was “innocent.”

Defendant told Deputy Hernandez that after the incident, he threw one of his sweatshirts out of the window onto the highway, and he cleaned the truck because there were “just a few blood droplets.” Defendant initially said Moncada would only have bruises from punches, but later said he might have cut Moncada with a broken bottle.

Defendant testified he was taken to the hospital after he was arrested and received 18 stitches on the back of his left hand. Defendant testified the injuries on his hand were from both the fight with Moncada and the accident at work.

Defendant testified he did not intend to kill Moncada, and he was just trying to “resolve the problem” with his wife. He did not try to run Moncada over with the truck. He did not tell Moncada that he had a tomb ready for him. He did not threaten to kill Moncada and his family if he called the police.

PROCEDURAL HISTORY

The information

Defendant was charged with count 1, attempted murder of Moncada (Pen. Code, §§ 664/187);⁷ count 2, assault with a deadly weapon on Moncada by the personal use of a “beer bottle, vehicle, and/or knife” (§ 245, subd. (a)(1)); and count 3, dissuading or preventing a victim and/or a witness of a crime, or attempting to prevent or dissuade him, from attending or giving testimony at a trial, by mean of force or express or implied threat of force or violence (§ 136.1, subd. (c)(1)).

It was further alleged as to count 1, attempted murder, that the crime was committed with premeditation and deliberation (§ 189); and defendant personally used a deadly or dangerous weapon, “a beer bottle, vehicle, and/or knife,” during the commission or attempted commission of the offense (§ 12022, subd. (b)(1)).

As to counts 1 and 2, it was alleged that defendant personally inflicted great bodily injury on the victim during the commission of the offenses (§ 12022.7).

Instructions

As to count 1, the jury was instructed on attempted murder, premeditation and deliberation.

Also, as to count 1, the jury was instructed on the lesser included offense of attempted voluntary manslaughter based on sudden quarrel or heat of passion; and attempted voluntary manslaughter based on imperfect self-defense.

As to the deadly weapon enhancement for count 1 and the charged offense in count 2, the jury was instructed that a deadly or dangerous weapon was “any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.”

The jury was instructed on simple assault as a lesser included offense of count 2.

⁷ All further statutory references are to the Penal Code unless otherwise indicated.

As we will discuss in issue V, the jury received several instructions on self-defense as a full defense, and mutual combat.⁸

Convictions and sentence

On June 28, 2016, after a jury trial, defendant was convicted of the charged offenses and the jury found the special allegations true.⁹

On August 16, 2016, the court sentenced defendant as to count 1, attempted murder, to life in prison with a minimum parole eligibility of seven years, plus consecutive terms of one year for the deadly weapon enhancement and three years for the great bodily injury enhancement; and as to count 3, intimidating a witness, a consecutive midterm of three years. The court stayed the term imposed for count 2, assault with a deadly weapon, and the accompanying enhancement pursuant to section 654.

DISCUSSION

I. Substantial Evidence of Attempted Murder

Defendant contends his conviction for attempted murder must be reversed because the People failed to prove beyond a reasonable doubt that he did not act in reasonable or unreasonable self-defense, or heat of passion based upon sudden provocation. Defendant argues these defenses were supported by the evidence and negated the express malice required to prove attempted murder, and the People failed to meet its burden to prove beyond a reasonable doubt that he did not act with such intent.

⁸ In issue V, *post*, we will address defendant's contentions that the jury was improperly instructed with CALCRIM No. 3471, mutual combat, and that the instruction undermined his claim of self-defense.

⁹ In his opening brief, defendant states the jury found true the enhancement for count 1 that he "personally used a deadly weapon, a beer bottle." However, the information alleged as to count 1 that defendant personally used a deadly or dangerous weapon, "a beer bottle, vehicle, and/or knife," during the commission or attempted commission of the offense (§ 12022, subd. (b)(1)). The verdict form was consistent with the information and stated the jury found true as to count 1 that defendant personally used a deadly or dangerous weapon, "to wit: a beer bottle, vehicle, and/or knife."

In support of his self-defense claim, defendant contends that Moncada was the aggressor who pulled a knife and defendant was compelled to defend himself with a beer bottle. As for heat of passion, defendant argues there was evidence of sudden provocation because of the “volatile” situation between Moncada and defendant’s wife, and Moncada was allegedly texting with defendant’s wife while he was in defendant’s truck.

As we will explain, the jury was instructed on these theories and the lesser included offense of attempted voluntary manslaughter. As we will also explain, defendant’s arguments primarily rely on his own trial testimony about what happened in the field. He further asserts Moncada’s version of the incident was unreliable because he lied to the police, he never said defendant had a knife, and his claims about being hit by the truck were exaggerated and inherently improbable.

A. *Substantial Evidence*

We begin with the well-settled principles that “[t]o assess the evidence’s sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict – i.e., evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, original italics (*Zamudio*).)

“Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

“The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.] We ‘must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]’ [Citation.] ‘Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.]’ [Citation.] Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal. [Citation.]” (*Zamudio, supra*, 43 Cal.4th at pp. 357–358.)

B. Attempted Murder

“ ‘The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice – a conscious disregard for life – suffices. [Citation.]’ [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).)

“In contrast, ‘[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.] Hence, in order for defendant to be convicted of the attempted murder of the [victim], the prosecution had to prove he acted with specific intent to kill that victim. [Citation.]” (*Smith, supra*, 37 Cal.4th at p. 739.)

“Intent to unlawfully kill and express malice are, in essence, ‘one and the same.’ [Citation.] To be guilty of attempted murder of the [victim], defendant had to harbor express malice toward that victim. [Citation.] Express malice requires a showing that the assailant ‘ ‘ ‘either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.’ [Citation.]” ’ [Citation.]” (*Smith, supra*, 37 Cal.4th at p. 739.)

“ ‘There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions.

[Citation.]’ ” (*Smith, supra*, 37 Cal.4th at p. 741; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207–1208.) Although motive is not an element of attempted murder, it can be evidence of an intent to kill. (*Smith, supra*, 37 Cal.4th at p. 735.)

C. The People’s Burden

Defendant argues that his conviction for attempted murder must be reversed because the People failed to prove beyond a reasonable doubt that he did not act in self-defense or in the heat of passion, which would have negated express malice. Defendant’s arguments are based on *People v. Rios* (2000) 23 Cal.4th 450 (*Rios*), where the court addressed the People’s burden in murder cases.

“ ‘ “[A] defendant who intentionally and unlawfully kills ... lacks malice ... when [he] acts in a ‘sudden quarrel or heat of passion’ [citation], or ... kills in ‘unreasonable self-defense’ – the unreasonable but good faith belief in having to act in self-defense [citations].” [Citation.]’ [Citations.]” (*Rios, supra*, 23 Cal.4th at pp. 460–461.)

“These mitigating circumstances reduce an intentional, unlawful killing from murder to voluntary manslaughter ‘by *negating the element of malice* that otherwise inheres in such a homicide [citation].’ [Citation.] *Provocation* has this effect because of the words of section 192 itself, which specify that an unlawful killing that lacks malice because committed ‘upon a sudden quarrel or heat of passion’ is voluntary manslaughter. [Citation.] *Imperfect self-defense* obviates malice because that most culpable of mental states ‘cannot coexist’ with an actual belief that the lethal act was necessary to avoid one’s own death or serious injury at the victim’s hand. [Citations.] Because one who kills unlawfully and intentionally, but lacks malice, is guilty of voluntary manslaughter, ‘[intentional] voluntary manslaughter ... is considered a lesser necessarily included offense of intentional murder.’ [Citation.]” (*Rios, supra*, 23 Cal.4th at p. 461, original italics, fn. omitted.)

“Thus, where the defendant killed intentionally and unlawfully, evidence of heat of passion, or of an actual, though unreasonable, belief in the need for self-defense, is

relevant only to determine whether *malice has been established*, thus allowing a conviction *of murder*, or *has not been established*, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter. Indeed, in a murder case, unless the People’s own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant’s* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.]” (*Rios, supra*, 23 Cal.4th at pp. 461–462, original italics.)

“If the issue of provocation or imperfect self-defense is thus ‘properly presented’ in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.] California’s standard jury instructions have long so provided. [Citation.] In such cases, if the fact finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that provocation (or imperfect self-defense) was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter. [Citations.]” (*Rios, supra*, 23 Cal.4th at p. 462, original italics.)

These principles equally apply to a charge of attempted murder, which requires express malice. The prosecution must prove beyond a reasonable doubt, among other things, the defendant acted with malice aforethought. To determine whether the defendant acted with malice aforethought, the prosecution must prove beyond a reasonable doubt that the defendant did not act in imperfect self-defense or heat of passion, when those theories are at issue based on the state of the evidence. Assuming the prosecution meets its burden on this element, and attempted murder’s other elements, the defendant is guilty of attempted murder. If, however, the prosecution fails to establish beyond a reasonable doubt the defendant did not act in imperfect self-defense or heat of passion, the prosecution fails to carry its burden and the defendant is guilty of attempted voluntary manslaughter. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1241–1242.)

D. The Instructions

Defendant was charged in count 1 with attempted murder, and the jury was fully instructed on the elements of the offense.

The jury was instructed on the lesser included offenses of attempted voluntary manslaughter based on sudden quarrel or heat of passion; and attempted voluntary manslaughter based on imperfect self-defense. In these instructions, the jury was told that the People had “the burden of proving beyond a reasonable doubt” that the defendant was not acting as a result of a sudden quarrel or heat of passion, or in imperfect self-defense; and if the People did not meet this burden, the jury had to find defendant not guilty of attempted murder.

The jury was further instructed on the right to lawful self-defense as a complete defense, and that the People had the burden to prove beyond a reasonable doubt that defendant did not act in lawful self-defense.

E. Analysis

Defendant asserts his attempted murder conviction must be reversed because the People failed to prove beyond a reasonable doubt that he did not act in self-defense or in the heat of passion upon a sudden quarrel.

At trial, Moncada testified that, after a brief conversation with defendant about whether Moncada was involved with defendant’s wife, defendant immediately assaulted Moncada by repeatedly hitting him in the head with the beer bottle. Moncada described defendant’s determined efforts as he attempted to kill Moncada in the field by repeatedly battering his head and face with the intact beer bottle and face; trying to slash his neck with “the cutter”; using Moncada’s own sweater to try and strangle him; chasing Moncada in the truck and knocking him down; and using the broken beer bottle to slash his chest, torso and back.

Defendant offered a completely different version of events in his trial testimony – that they started arguing, defendant insulted Moncada’s mother, Moncada pushed him,

and they started hitting each other. Defendant testified they fought with each other, fell, and wrestled until Choccolao separated them. Defendant testified that he tried to leave, but Moncada pulled a knife and came at him. Defendant claimed he used the beer bottle to defend himself, but Moncada lunged at him with the knife, and they wrestled over the weapon.

Defendant's substantial evidence arguments, and his claims about the People's failure to meet the burden of proof, are based upon his own trial testimony, where he described Moncada as the aggressor who pulled the knife and forced defendant to defend himself with the broken beer bottle. In reviewing a substantial evidence challenge, however, "[c]onflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*Zamudio, supra*, 43 Cal.4th at p. 357.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young, supra*, 34 Cal.4th at p. 1181.)

The jury was presented with two very different accounts of what happened in the field. The jury was properly instructed on attempted murder, attempted voluntary manslaughter, and the prosecution's burden of proving beyond a reasonable doubt that defendant did not act in self-defense or heat of passion upon sudden provocation. The jury was also instructed on determining the credibility of the witnesses and evaluating conflicting evidence; the testimony of a single witness can prove any fact; and consciousness of guilt based on false statements.

While defendant's testimony supported the instructions on attempted voluntary manslaughter, perfect and imperfect self-defense, and heat of passion, the jury rejected defendant's credibility in finding him guilty of the charged offenses and enhancements.

Defendant contends the People's evidence did not refute his claim of self-defense and Moncada's credibility was undermined because he "lied to police about the incident, telling them a wildly exaggerated story" that he had been kidnapped and assaulted by unknown people, and "[t]his was the only version of events in which he mentioned a knife – carried by the unknown assailant described to police." At trial, however, Moncada acknowledged that he gave a false statement when he was interviewed at the hospital. Moncada testified that he was frightened by defendant's threats to harm Moncada and his family if he talked to the police about the incident, he believed the threats since defendant had tried to kill him in the field, and he had not yet contacted his family after the incident. Officer Caudillo, who interviewed him at the hospital, testified that Moncada seemed "really nervous" when he gave his statement." Moncada further testified that once his family arrived at the hospital, he realized they were safe and immediately told them to take him directly to the police department, where he told the officers that defendant was the responsible party. Caudillo also met with him at the police department and testified that Moncada seemed "almost remorseful for having told me one story" at the hospital. Moncada's prior inconsistent statements to the police, and the reasons why he gave those statements, raised credibility issues for the jury to address and resolve. The jury's credibility determinations are supported by substantial evidence.

Defendant argues Moncada's credibility was further undermined because he was impeached with his prior testimony that the truck was going 30 to 40 miles per hour when it hit him, and his conflicting statements about where he was hit, compared to his trial testimony that he was not injured when he was knocked down. Moncada testified at trial that the left side of the truck hit the right side of his body, he fell down, and he was not injured, and he did not know how fast the truck was going. The parties stipulated that at

a prior hearing, Moncada testified the right side of the truck hit him, and the truck was going 30 to 40 miles per hour. While Moncada's prior testimony about the speed of the truck may have been questioned (see, e.g., *People v. Perez* (2018) 4 Cal.5th 1055, 1067), his statements raised a credibility issue for the jury to resolve and did not render the entirety of his trial testimony inherently improbable, particularly since he did not claim that he was injured when he was knocked down.

Defendant also argues Moncada "never described that [defendant] brandished or otherwise used a knife, which the prosecutor alleged as one of the weapons used by [defendant]." This claim is refuted by the record. The information charged defendant in count 2 with assault with a deadly weapon on Moncada by the personal use of a "beer bottle, vehicle, and/or knife." As to count 1, attempted murder, it was alleged defendant personally used a deadly or dangerous weapon, "a beer bottle, vehicle, and/or knife," during the commission or attempted commission of the offense (§ 12022, subd. (b)(1)).

The allegations were in the disjunctive, and defendant has not argued that he did not receive adequate notice of the charges. Moncada testified that defendant used a beer bottle, some type of sharp object, and the truck during the attack. More importantly, the jury was correctly instructed as to both count 2 and the personal use enhancement that a deadly or dangerous weapon was "any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."¹⁰

Defendant acknowledges that Moncada said defendant pulled a box cutter from his pocket but argues a box cutter is generally not considered the equivalent of a knife; there

¹⁰ In closing argument, the prosecutor's discussion about the personal use enhancement was consistent with the information: "So what deadly weapons are charged? We have the beer bottle. And ... we're talking about the broken beer bottle.... We have the vehicle and we have the knife – the box cutter." As to count 2, the prosecutor argued that three weapons were charged, consisting of a broken beer bottle, the truck, and the knife.

was no physical evidence that a box cutter existed; and Moncada was the person who pulled a knife. Defendant's arguments are again dependent upon his own trial testimony – that he never pulled a knife or any type of weapon, Moncada produced a knife and pursued him at the truck, Moncada tried to stab him with the knife, defendant used the beer bottle in self-defense, obtained control of the knife, and threw it away in the field.

In contrast, Moncada consistently described the weapon used by defendant as “a blade – a cutter, like to cut paper.” On cross-examination, defense counsel asked Moncada about the object defendant had. Moncada testified defendant “pulled out the knife” but was asked to clarify his response.

“Q. Did [defendant] strike you with a box cutter?

“A. I do not understand what that is.

“Q. Did [defendant] strike you with a knife?

“A. Yes.

“Q. And is it a knife or is it something that you use to cut boxes?

“A. It's like to cut boxes.”

Moncada's testimony thus supported the personal use allegations for both count I and the enhancement and did not render his testimony inherently incredible.

Finally, defendant asserts the People's evidence failed to refute his own trial testimony that he acted in the heat of passion upon a sudden provocation. Defendant argues in his brief:

“The two men began discussing the situation [about defendant's] wife, which then escalated into an insulting match, with Moncada pushing [defendant]. Earlier while in the car [*sic*] [Moncada] was texting with [defendant's] wife. Its [*sic*] hard to imagine a more volatile situation with a younger relative apparently flaunting his ongoing relationship with [defendant's] wife.”

The trial evidence refutes defendant's claim that Moncada texting his wife while he was in the truck. Moncada testified that during the drive in the truck, defendant and Chocolao talked with each other and Moncada was texting on his cell phone.

“Q. And at that point when you guys stopped at the convenience store gas station, you didn’t feel threatened?

“A. No. And I was actually texting on my phone.

“Q. Were you texting the entire time that you were in the car?

“A. Yes.”

Moncada testified he texted while defendant drove from Arvin to the insurance office, but he was not texting when defendant left the insurance office, drove past the outlet stores, and headed into the fields.

On cross-examination, defense counsel asked Moncada about what happened when the truck stopped in the field and defendant asked him about his wife.

“Q. When you had that conversation with [defendant], had you been texting his wife?

“A. No, not at that moment.”

Moncada was not asked and did not testify who he was texting with when he was in the truck. Moncada testified that defendant’s wife had sent him the “flirtatious” text messages “before” the date of this incident, but that happened five or six months earlier. Defendant never testified that he believed Moncada was texting with his wife while they were in the truck together.

There is thus no evidence that Moncada was texting with defendant’s wife while he was a passenger in the truck with defendant, or that defendant may have believed Moncada was doing so that day.

We find defendant’s conviction for attempted murder is supported by substantial evidence.

II. Substantial Evidence of Premeditation for Attempted Murder

Defendant next contends the People failed to prove beyond a reasonable doubt the special allegation that he committed the attempted murder with premeditation and deliberation. Defendant asserts there was no evidence of planning or motive to kill, the incident was likely the result of a “rash impulse,” the facts showed that Moncada was the

aggressor, and the incident began as a fistfight that escalated to the use of weapons, which is insufficient to prove premeditation and deliberation.

A. *Premeditation and Deliberation*

“Unlike murder, an attempted murder ... requires express malice and cannot be proved based upon a showing of implied malice. [Citation.]” (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.)

“Also, unlike murder, attempted murder is not divided into degrees. The prosecution, though, can seek a special finding that the attempted murder was willful, deliberate, and premeditated, for purposes of a sentencing enhancement. [Citation.]” (*People v. Mejia, supra*, 211 Cal.App.4th at p. 605; *People v. Favor* (2012) 54 Cal.4th 868, 876–877.)

“We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citation.]” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462–1463, fn. 8; disapproved on other grounds by *People v. Mesa* (2012) 54 Cal.4th 191.) In order to address defendant’s challenges to the premeditation finding for his attempted murder conviction, we thus turn to cases about premeditation in first degree murder cases.

“An intentional killing is premeditated and deliberate if it occurred as the result of reflection rather than unconsidered or rash impulse. [Citations.]” (*People v. Nelson* (2011) 51 Cal.4th 198, 213.)

“A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Nelson, supra*, 51 Cal.4th at p. 213.)

“ ‘Premeditation and deliberation can occur in a brief interval....’ ” (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) “The process of premeditation and deliberation does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly’ [Citations.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, abrogated on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.)

B. *Anderson*

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the court identified three factors commonly present in cases of premeditated murder: “(1) [F]acts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a ‘preconceived design’ to take his victim’s life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*Id.* at p. 27, original italics.)

“Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation] or

whether it ‘leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.’ [Citation.]” (*Anderson, supra*, 70 Cal.2d at p. 25, first italics in original, second italics added in original; *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1265 (*Boatman*).)

Under *Anderson*, “[a] reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported – preexisting motive, planning activity, and manner of killing – but ‘[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.’ [Citations.]” (*People v. Jurado* (2006) 38 Cal.4th 72, 118–119; *People v. Burney* (2009) 47 Cal.4th 203, 235.)

The California Supreme Court has cautioned that “[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way. [Citation.]” (*People v. Thomas* (1992) 2 Cal.4th 489, 517; *People v. Casares* (2016) 62 Cal.4th 808, 824.)

“This framework does not establish an exhaustive list of required evidence that excludes all other types and combinations of evidence that may support a jury’s finding of premeditation [citation], nor does it require that all three elements must be present to affirm a jury’s conclusion that premeditated murder was intended. [Citations.]” (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1626; *People v. Perez* (1992) 2 Cal.4th 1117, 1125; *People v. Brady* (2010) 50 Cal.4th 547, 561–562.)

C. Analysis

Defendant asserts the evidence is insufficient to support the jury’s finding that the attempted murder was premeditated based on the *Anderson* factors. Defendant argues the

evidence showed that he either “responded to an aggressive Moncada” who pushed defendant after he insulted his mother, “or at best was engaged in a fistfight which escalated to use of a box cutter, a broken bottle and or a knife – either of which is insufficient proof of premeditation and deliberation.” Defendant further argues there was no evidence of preexisting reflection, Moncada’s trial testimony was inherently improbable because of the inconsistencies about being hit by the truck, and the incident likely resulted from defendant’s unconsidered or rash impulse.

As in his contentions in issue I about attempted murder, defendant’s substantial evidence arguments are primarily based upon his own trial testimony. As we have explained, the jury was presented with two different versions of what happened in the field. The jury was properly instructed on the factors to evaluate the credibility of the witnesses, and it found defendant guilty as charged indicating that it rejected his claim that Moncada was the aggressor and that defendant was forced to defend himself with the beer bottle. In any event, we turn to defendant’s arguments based upon the *Anderson* factors.

1. Motive

Defendant contends evidence of motive was “entirely lacking” because he did not express “any previous desire to kill Moncada.” Defendant dismisses any motive based on Moncada’s “physical relationship” with his wife because Moncada denied any physical relationship aside from kissing her. Defendant further argues that his wife told him that Moncada had tried to “abuse” her, “which is distinct from being under the impression that she was having a physical, intimate relationship with this younger man.”

Moncada testified that defendant’s wife started sending him flirtatious text messages about five to six months before the incident in the field, he tried to discourage her, and they exchanged a few kisses but did not have a sexual relationship. Moncada also testified that he had seen defendant prior to this incident, and defendant never said anything about his wife.

The evidence as to defendant's motive was established by what defendant believed at the time of the incident in the field. Moncada testified that when they stood by the truck and talked, defendant immediately accused Moncada of sending text messages to his wife, flirting with her, and accosting and harassing her. Defendant said Moncada had destroyed his family. Moncada denied defendant's accusations and said he had not harassed his wife and there had been nothing physical between them. Moncada testified defendant asked him the same questions two or three times, and Moncada denied his accusations. Moncada testified defendant began his attack on him immediately after his denials.

In his own trial testimony, defendant said that about a week before the incident, his wife told him that Moncada had "tried to abuse her." Defendant said when they talked in the field, he asked Moncada twice if he "really tried to abuse" his wife and why he did it, Moncada denied it, and they started arguing.

" '[T]he law does not require that a first degree murderer have a "rational" motive for killing. Anger at the way the victim talked to him ... may be sufficient.' [Citations.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 87, abrogated on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) There was substantial evidence from which a rational trier of fact could find that defendant had a motive to kill Moncada based on his belief that Moncada had flirted, harassed, and/or abused his wife, that he confronted Moncada with these accusations when they were alone in the field, his rejection of Moncada's repeated denials, and how he began his attack upon Moncada immediately after this brief conversation.

In his challenge to evidence about motive, defendant asserts the evidence showed "nothing more" than an angry impulse or explosion of violence, inconsistent with premeditation. Defendant relies on *Boatman, supra*, 221 Cal.App.4th 1257, in support of this argument.

Boatman addressed both planning and motive and found the evidence was insufficient to support premeditation. However, the facts of *Boatman* are significantly different from this case. The defendant shot his girlfriend while they were in a bedroom of his family's home, a few hours after he had been released on bail from jail. (*Boatman, supra*, 221 Cal.App.4th at p. 1258.) The defendant gave different versions of what happened. (*Id.* at p. 1259.) At trial, however, he testified that his girlfriend found the gun under his pillow and pointed it at him. The defendant took it and “ ‘jokingly’ ” (*id.* at p. 1263) pointed it at her. While pointing it at her, he cocked the hammer and admitted he was being stupid because he knew the gun was loaded. The defendant testified the gun discharged because she slapped it, he almost dropped it, and he tried to catch it and instinctively squeezed the trigger. Immediately after the shooting, the defendant told his brother to call the police, and he attempted to give her mouth-to-mouth resuscitation. When he was taken into custody, he was distraught about what happened. (*Id.* at pp. 1259–1260.)

Boatman held there was no “planning evidence whatsoever” (*Boatman, supra*, 221 Cal.App.4th at p. 1267) and “nothing in any of his statements to indicate that he considered shooting [his girlfriend] beforehand or carefully weighed considerations for and against killing her.” (*Id.* at p. 1265.) The defendant and his girlfriend were not at “a remote or isolated location” but in the family house where there were other people who could identify him. (*Id.* at p. 1267.) There was no evidence “that defendant left the room or the house to get a gun, or that he even moved from his squatting position on the floor” when she produced the gun. (*Ibid.*) The court further found the “[d]efendant’s behavior following the shooting [was] of someone horrified and distraught about what he had done, not someone who had just fulfilled a preconceived plan” since he tried to resuscitate his girlfriend, told his brother to call the police, and could be heard crying in the background during the 911 call. (*Ibid.*) *Boatman* concluded that “[t]he evidence not

only fails to support an inference of a plan to kill [his girlfriend], but strongly suggests a lack of a plan to kill.” (*Ibid.*, original italics.)

Boatman also found “little or no relevant motive evidence” (*Boatman*, *supra*, 221 Cal.App.4th at p. 1267.) The only motive evidence was a text message from the victim to a friend, stating that she was having a fight with the defendant. *Boatman* rejected the People’s argument that the jury could have inferred that the defendant was “ ‘in a bad mood after being released from custody and he was angry with [his girlfriend].’ ” (*Id.* at pp. 1267–1268.) “Even if such a mood or anger can be reasonably inferred from [the victim’s] texts and could suggest the intent to kill, it is, at most, weak evidence of a motive suggesting premeditation and deliberation.” (*Id.* at p. 1268.) The evidence of defendant’s bad mood and an argument with the victim was most consistent with an unconsidered or rash impulse and not preexisting reflection and deliberation. (*Ibid.*)

In contrast to *Boatman*, there was evidence of defendant’s motive based on the trial testimony from both Moncada and defendant about defendant’s anger that Moncada was somehow involved with his wife, and defendant’s accusations immediately before he began beating Moncada in the head. Defendant waited to confront Moncada with these accusations until he had pulled into the field. Defendant beat Moncada in the head, chased him when he tried to break free, and tried to strangle him with the sweater and slash his neck with the sharp “cutter.” Defendant only stopped when Chicolao warned him that people were driving by the field and someone could call the police. Defendant broke Moncada’s cell phone, threatened to kill him if he reported the attack to the police, and left him in the field.

2. Planning

Defendant argues there was no evidence of planning activities since they had gone together to pay the insurance on previous occasions, defendant was only “armed” with a beer bottle that he bought on the way to the insurance office, “Chicolao” was present and

a potential witness, defendant's use of an alternate route after he left Bakersfield also led to Arvin, and the activation of the child lock on the backdoor was not "nefarious" since he never prevented Moncada from leaving and opened the latch when Moncada asked to get out.

As with motive, a rational juror could conclude from the evidence that defendant planned to kill Moncada when the opportunity presented itself during their trip to the insurance office. Once the insurance bill was paid in Bakersfield, Moncada did not ask to get out of the truck and assumed they were returning to their homes in Arvin. Instead, defendant took an alternate route, claimed he wanted to test the truck, drove past the outlet stores, continued into a remote rural area, and finally stopped in a field. When Moncada tried to get out of the truck, he discovered the child latch was activated. Defendant released the latch, confronted Moncada about whether he was involved with his wife and began the assault.

As explained above, the process of premeditation and deliberation does not require any extended period of time and can occur in a brief interval. (*People v. Mayfield, supra*, 14 Cal.4th at p. 767; *People v. Sanchez, supra*, 26 Cal.4th at p. 849.) The jury could reasonably find defendant decided it was the right time to confront and attack Moncada because of what he believed about his relationship with his wife, after he had successfully taken him to a secluded area. No one else was present except for Chocolao, who was "plastered" and did not do anything to help Moncada.

Defendant argues there was no evidence of planning because he was only "armed" with the beer bottle that he bought on the way to the insurance office. This argument ignores Moncada's detailed testimony about how defendant used the intact beer bottle, and later the broken bottle, to relentlessly beat Moncada in the head. This argument also ignores Moncada's testimony that defendant pulled the sharp "cutter" object from his pocket and tried to slash his throat, thus establishing defendant already had a weapon with him.

Defendant asserts the circumstances were more consistent with “[a]nger that arises on the spot because of a confrontation” instead of planning and premeditation. However, “[t]he lack of provocation by the victim leads to an inference that an attack was the result of a deliberate plan rather than a ‘rash explosion of violence.’ [Citation.]” (*People v. Miranda, supra*, 44 Cal.3d at p. 87.) Moncada testified that after defendant asked him about his wife, he suddenly lunged at him and began the attack by hitting him in the head with the bottle. Defendant testified to a different version of events and claimed Moncada was aggressive toward him and pulled a knife, but the jury rejected defendant’s alternate explanation.

Defendant argues evidence of his alleged consciousness of guilt and “efforts to hide the incident” are irrelevant to premeditation. However, defendant’s inconsistent post-arrest statements about the incident and his own injuries, and his ultimate admission that he threw away his own bleeding clothing and washed the blood out of the truck, were factors for the jury to consider in evaluating his credibility.

3. Manner of Attempting to Kill the Victim

Defendant argues there is insufficient evidence of premeditation based upon the manner of the attack as described by Moncada because it “was hardly suggestive of an intent to kill, let alone a premeditated murder,” and the most “suggestive evidence” was the claim that defendant tried to use Moncada’s sweater to choke him but Moncada “foiled by simply taking the sweater off.” “[I]t shows no plan to kill when relying on a subject’s sweater as a weapon to inflict death.”

Defendant’s account about the sweater are taken out of context to the sequence of events that unfolded in the field. Moncada testified that almost immediately after he denied defendant’s accusations about being involved with his wife, defendant repeatedly hit Moncada in the head with the intact beer bottle. Moncada testified defendant hit him in the head “with all his might” but he was able to block some of the blows. Moncada fell, defendant got on top of him, and continued to beat him in the head and face with his

fists. Moncada was able to get up and tried to run away. Instead of allowing Moncada to leave, defendant grabbed his sweater and pulled him back, and continued to beat him in the face with his fists.

Defendant produced the cutter and attempted to slash Moncada's neck. Moncada fought off the attempt to slash him and again tried to escape; defendant again grabbed his sweater and pulled him back. It was at this point that, after failing to stab him with the cutter, defendant rolled the garment around Moncada's neck and attempted to choke him with it. Moncada testified that he could not breath normally and was able to get out of the sweater and run away. Defendant again declined to let Moncada leave, chased him in the truck, and then assaulted him with the broken beer bottle.

As in issue I, defendant contends Moncada's claims that defendant chased him in the truck and knocked him down with the vehicle were inherently improbable because of his inconsistent statements and lack of physical injuries. We have already explained that while Moncada's prior testimony about the speed of the truck may have been questioned, his statements raised a credibility issue for the jury to resolve and did not render his entire testimony inherently incredible.

Defendant argues that if he had planned to kill Moncada, "it would seem he would have brought something more effective for accomplishing that, instead of relying on a beer bottle that was in the car." In addressing the manner of attempting to kill Moncada, however, defendant again fails to address Moncada's testimony that defendant pulled the sharp "cutter" object out of his pocket, and thus already had it with him when he got into the truck that morning. Evidence the defendant armed himself prior to the attack with a knife and carried such an object makes it " 'reasonable to infer that he considered the possibility of homicide from the outset.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1250; *People v. Elliot* (2005) 37 Cal.4th 453, 471.)¹¹ "A violent and bloody death

¹¹ We will address defendant's appellate contentions about alleged prosecutorial misconduct below. In his arguments on that issue, defendant addresses the box cutter and

sustained as a result of multiple stab wounds can be consistent with a finding of premeditation. [Citation.]” (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

Even if defendant’s initial attack upon Moncada with the intact beer bottle was spontaneous, he had time to reflect upon his actions when Moncada repeatedly tried to break free. Instead of allowing Moncada to leave, defendant chased him, pulled Moncada back, continued the physical assault by beating him in the head, tried to strangle him by rolling the sweater around his neck with such force that Moncada struggled to breathe, and pulled the sharp “cutter” object from his pocket and tried to slash Moncada’s throat. (See, e.g., *People v. Perez, supra*, 2 Cal.4th at p. 1129; *People v. Lewis* (2009) 46 Cal.4th 1255, 1293.)

The fact that defendant’s efforts to strangle Moncada with his sweater, slash his neck with the “cutter,” and cut his back and torso with the broken bottle were thwarted by Moncada’s desperate attempts to protect himself, and were ultimately unsuccessful to inflict fatal wounds, does not negate the evidence in support of premeditation based on the manner in which he tried to kill Moncada.

III. Substantial Evidence for Great Bodily Injury Enhancements

Defendant raises a substantial evidence challenge to the jury’s findings on the enhancements to counts 1 and 2, that he personally inflicted great bodily injury on Moncada during the commission of the offenses (§ 12022.7). Defendant asserts the jury’s findings are not supported by substantial evidence because Moncada only suffered “moderate” injuries.

Section 12022.7, subdivision (a) requires imposition of an enhancement for any person who “personally inflicts great bodily injury” on someone other than an accomplice in the commission or attempted commission of a felony. “As used in this section, ‘great bodily injury’ means a significant or substantial physical injury.” (§ 12022.7, subd. (f).)

challenges the People’s evidence about premeditation because “at best [defendant] only came armed with a box cutter for an implement to accomplish his murder”

“[T]he injury need not be so grave as to cause the victim ‘ “permanent,” “prolonged,” or “protracted” ’ bodily damage. [Citation.]” (*People v. Cross* (2008) 45 Cal.4th 58, 64 (*Cross*).)

The jury in this case was correctly instructed that great bodily injury meant “significant or substantial injury. It is an injury that is greater than minor or moderate harm.”

“This court has long held that determining whether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] ‘ “A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.” ’ [Citations.] Where to draw that line is for the jury to decide.” (*Cross, supra*, 45 Cal.4th at p. 64.)

The People’s relied on Moncada’s trial testimony, and the photographs of his injuries, to support the great bodily injury enhancements. There was no independent medical testimony introduced.

Defendant argues that Moncada’s broken nose was insufficient to support the enhancement. While “every bone fracture” is not great bodily injury as a matter of law, a jury “very easily” could find a broken nose constitutes great bodily injury as a matter of fact if it “results in a serious impairment of physical condition.” (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1497–1498.)

As Moncada explained at trial, however, his injuries were not limited to his broken nose but included multiple abrasions and cuts to his face, head, neck, chest, and back, resulting from defendant’s attack with the intact and broken beer bottles, the sharp “cutter,” and punching and kicking him in the head and face. Moncada testified that during the attack, he felt faint from the multiple blows and could not run away. When Moncada was taken to the hospital, he was in the emergency room for several hours and many of the injuries required sutures and left scars on his body. The People introduced

photographs of Moncada's body that showed sutures that had been required for large cuts on his arms and shoulders, and the side of his chest; smaller cuts on his back; a cut between his eye and brow; and on the three fingers that were cut when he tried to pry the "cutter" out of defendant's hand. The photographs also showed scratches, bruises and cuts on his back, torso, the side of his face, his lip, and ear.

Similar injuries have been found sufficient to support the enhancement.

"Abrasions, lacerations, and bruising can constitute great bodily injury. [Citation.]" (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) "An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.' (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836–837 ... [multiple contusions, swelling and discoloration of the body, and extensive bruises were sufficient to show 'great bodily injury']; see *People v. Sanchez* (1982) 131 Cal.App.3d 718 ..., disapproved on other grounds in *People v. Escobar* (1992) 3 Cal.4th 740, 755... [evidence of multiple abrasions and lacerations to the victim's back and bruising of the eye and cheek sustained a finding of 'great bodily injury'] [(*Escobar*)]; see also *People v. Corona* (1989) 213 Cal.App.3d 589 ... [a swollen jaw, bruises to head and neck and sore ribs were sufficient to show 'great bodily injury'].)" (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047–1048.)¹²

We cannot say as a matter of law that Moncada's cuts, scars, and abrasions did not constitute significant or substantial injuries. We therefore reject defendant's argument that Moncada only suffered "moderate" harm. (See, e.g., *People v. Hale* (1999) 75 Cal.App.4th 94, 108 [broken teeth, split lip, and cut under eye]; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755 [contusions and lacerations on the nose, elbow, thigh and lip

¹² *People v. Jaramillo* and *People v. Sanchez* were decided pursuant to the more onerous definition of great bodily injury that had been in *People v. Caudillo* (1978) 21 Cal.3d 562, later disapproved in *People v. Escobar*, *supra*, 3 Cal.4th at page 751, footnote 5. However, any injury that would have qualified as great bodily injury under *Caudillo* would appear to so qualify under *Escobar's* less restrictive definition. (See, e.g., *Escobar*, *supra*, 3 Cal.4th at p. 752.)

from being punched in the head]; *People v. Guilford* (2014) 228 Cal.App.4th 651, 661, 662 [broken nose, bruised chin, swollen lip and red fingerprints on victim's neck]; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 680, 683 [defendant repeatedly punched victim in face and stomach, rammed his head into car door, and kicked him, resulting in a large gash to his face and profuse bleeding that required treatment at a hospital].

The jury's findings on the great bodily injury enhancements are supported by substantial evidence.

IV. CALCRIM No. 362

Defendant next contends the jury was improperly instructed with CALCRIM No. 362, which states:

“If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, *that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.* If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself.” (Italics added.)

Defendant objected to this instruction at trial and argued it violated his constitutional right to a fair trial and Evidence Code section 352. The court overruled the objections. On appeal, defendant again argues this instruction violated his right to due process because it allowed the jury to make improper permissive inferences of his guilt from his inconsistent postarrest statements to the police.

The California Supreme Court has repeatedly rejected constitutional challenges to CALCRIM No. 362 and its predecessor, CALJIC No. 2.03. (*People v. Moore* (2011) 51 Cal.4th 386, 413–414 [CALJIC No. 2.03]; *People v. Howard* (2008) 42 Cal.4th 1000, 1024–1025 [CALCRIM No. 362, CALJIC No. 2.03]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [CALJIC No. 2.03]; see also *People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104 [CALCRIM No. 362]; *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1205–1207 [CALCRIM No. 362].)

Defendant asserts these cases are not controlling because they addressed CALJIC No. 2.03 that used the phrase “consciousness of guilt,” whereas CALCRIM No. 362 substituted the term “awareness of guilt,” as italicized above. To the contrary, “[a]lthough there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362 [citation], none is sufficient to undermine our Supreme Court’s approval of the language of these instructions.” (*People v. McGowan, supra*, 160 Cal.App.4th at p. 1104.)

As defendant acknowledges, the identical argument about the impact of the different phrases “consciousness of guilt” and “awareness of guilt” was rejected by this court in *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158–1159, in relation to identical language in CALCRIM No. 372. *Hernandez Rios* found no difference in the meaning of the phrases. Defendant acknowledges *Hernandez Rios* but asks this court to reconsider our holding. We decline to do so.

V. The Mutual Combat Instruction was Properly Given

The court gave the jury a series of instructions on the right to self-defense as a full defense to the charged offenses. One of those instructions was CALCRIM No. 3471 on “mutual combat.” Defendant argues that while the self-defense instructions were appropriate, CALCRIM No. 3471 was not supported by any evidence of mutual combat and undermined his self-defense claim, misled the jury, lowered the People’s burden of proof, and prevented him from presenting a defense.

Defendant did not object to CALCRIM No. 3471. Defendant asserts he has not forfeited appellate review of because the instruction violated his substantial rights.

“Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. [Citations.] The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant’s substantial rights. [Citations.] ‘ “Ascertaining whether claimed instructional

error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim— at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.” [Citation.]’ [Citation.]” (*People v. Franco* (2009) 180 Cal.App.4th 713, 719.)

We thus turn to defendant’s instructional challenge.

A. *The Court’s Duty to Instruct*

“ ‘ “It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence” ’ and ‘ “necessary for the jury’s understanding of the case.” ’ [Citations.] It is also well settled that this duty to instruct extends to defenses ‘if it appears ... the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’ [Citations.]” (*People v. Brooks* (2017) 3 Cal.5th 1, 73; *People v. Crew* (2003) 31 Cal.4th 822, 835; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

“Substantial evidence in this context ‘ “is ‘evidence sufficient “to deserve consideration by the jury,” not “whenever *any* evidence is presented, no matter how weak.” ’ ” [Citation.]’ [Citation.] ‘In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether “there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt” [Citations.]’ [Citation.]” (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823–824, original italics; *People v. Salas* (2006) 37 Cal.4th 967, 982.)

B. *The Instructions*

The court gave the following instructions related to the right to self-defense.

1. CALCRIM No. 3470

First, the jury was instructed with CALCRIM No. 3470:

“Self-defense is a defense to the crimes charged in Counts 1 and 2 and the lesser included offenses. The Defendant is not guilty of those crimes if he used force against the other person in lawful self-defense. The defendant acted in lawful self-defense if:

“One, the Defendant reasonably believed that he was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

“Two, the Defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

“And, three, the Defendant used no more force than was reasonably necessary to defend against that danger.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The Defendant must have believed there was imminent danger of bodily injury to himself or an imminent danger that he would be touched unlawfully. The Defendant’s belief must have been reasonable and he must have acted because of that belief. The Defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the Defendant used more force than was reasonable, the Defendant did not act in lawful self-defense.

“When deciding whether the Defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to [the] Defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the Defendant’s beliefs were reasonable, the danger does not need to have actually existed.

“The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

“A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of bodily injury has passed. This is so even if safety could have been achieved by retreating.

“The People have the burden of proving beyond a reasonable doubt that the Defendant did not act in lawful self-defense. If the People have not met this burden, you must find the Defendant not guilty of the crimes charged in Counts One and Two or the lesser included offenses.”

2. CALCRIM No. 3471

The jury was next instructed with CALCRIM No. 3471, mutual combat, the instruction that defendant now challenges. It stated:

“A person who engages in mutual combat or who starts a fight has a right to self-defense only if:

“One, he actually and in good faith tried to stop fighting;

“Two, he indicated, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting;

“And, three, he gave his opponent a chance to stop fighting.

“If the Defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight.

“However, if the Defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the Defendant could not withdraw from the fight, then the Defendant had the right to defend himself with deadly force and was not required to try to stop fighting or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting.

“A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.”

3. CALCRIM No. 3472

The court then gave CALCRIM No. 3472, that the right of self-defense may not be contrived: “A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.”

4. CALCRIM No. 3473

Finally, the jury received CALCRIM No. 3474, that the right to self-defense ends when the danger no longer exists.

“The right to use force in ... self-defense continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force end.”

C. Mutual Combat

Defendant cites *People v. Ross* (2007) 155 Cal.App.4th 1033 (*Ross*) in support of his claim that there was no evidence to support CALCRIM No. 3471, the mutual combat instruction given in this case.

In *Ross*, the court held that it was erroneous to tell a jury to rely on the “common, everyday meaning” of “ ‘mutual combat’ ” because “the lay meaning of ‘mutual combat’ is too broad to convey the correct legal principle.” (*Ross, supra*, 155 Cal.App.4th at p. 1044.) *Ross* explained that the problem with the common definition of “mutual” was that “any combat may be correctly described as ‘mutual’ so long as it is seen to possess a quality of reciprocity or exchange. In ordinary speech, then, ‘mutual combat’ might properly describe any violent struggle between two or more people, however it came into being. If A walks up to B and punches him without warning, and a fight ensues, the fight may be characterized as ‘mutual combat’ in the ordinary sense of those words.” (*Ibid.*)

Ross held that “mutual combat” refers instead to “ ‘a duel or other fight begun or continued by mutual consent or agreement, express or implied. [Citations.]’ In other words, it is not merely the *combat*, but the *preexisting intention to engage in it*, that must be mutual.” (*Ross, supra*, 155 Cal.App.4th at p. 1045, first italics added in original, second italics in original, fn. omitted.)

“ ‘[M]utual combat’ consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.*” (*Id.* at pp. 1046–1047, original italics.)

CALCRIM No. 3471, the pattern instruction for mutual combat, was revised after the decision in *Ross* to “add in brackets: ‘A fight is *mutual combat* when it began or continued by mutual consent or agreement.’ [Citation.]” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1050, original italics.) As modified, CALCRIM No. 3471 has been found

to be a correct statement of the law (*People v. Nguyen, supra*, at p. 1050), and the jury herein was instructed with the modified version consistent with *Ross*.

D. Analysis

Defendant argues CALCRIM No. 3471 was misleading and undermined his defense because there was no evidence of mutual combat in this case, and the instruction required the jury to reject his credible claim of self-defense “unless [it] also found that he communicated an intent and desire to break off the engagement prior to using force.”

“A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]” (*Cross, supra*, 45 Cal.4th at pp. 67–68.) CALCRIM No. 3471 states the requirements for a person who engages in mutual combat to claim the right to self-defense, and also defines mutual combat so the jury can determine whether or not the instruction applies: “A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.” This language thus called upon the jury to make a determination, in the first instance, as to whether there was an express or implied “agreement” to engage in mutual combat. Based on this language, there is no reasonable likelihood that the jury would have believed that it was required by CALCRIM No. 3471 to assume that such an agreement existed.

More importantly, there was evidence from which a reasonable juror could have found evidence of an implied agreement for mutual combat to support the court’s decision to give the instruction. (*Ross, supra*, 155 Cal.App.4th at p. 1047.) As we have explained, Moncada testified defendant attacked him without provocation and he struggled to defend himself and prevent defendant from strangling him and slashing his neck.

Defendant described a different version of events in his trial testimony. Defendant testified that he asked Moncada whether he had abused his wife, defendant denied it, they argued and insulted each other, and defendant insulted Moncada's mother. Defendant testified that Moncada "pushed me, I pushed him, and then we began throwing blows."

"Q. And so he pushes you, you push him, you guys are fighting each other?

"A. Yes.

"Q. How are you fighting? With fists or wrestling? What are you guys doing?

"A. Fists."

Defendant testified Moncada hit his body multiple times and defendant blocked the blows with his arm. They fought like this for about five or eight minutes. "We grabbed each other. I had two sweatshirts [on]. He also had a sweatshirt [on] and we were wrestling" and they both fell down. Defendant testified they kept wrestling on the ground until Chocolao pulled them apart. Defendant broke Moncada's cell phone and decided to leave, Moncada pulled a knife and advanced on him. Defendant testified he broke the beer bottle and used it to protect himself as Moncada tried to stab him.

Defendant correctly points out that their contrasting stories at trial presented credibility issues for the jury.¹³ Nevertheless, there was sufficient evidence to support the mutual combat instruction because they jury could have reasonably interpreted defendant's testimony about the initial portion of the incident as implied evidence of mutual combat. The instruction was consistent with defendant's description about the initial part of the incident: they argued and insulted each other, they exchanged blows with their fists, and they wrestled on the ground; Chocolao separated them; defendant

¹³ While defendant argues there was no evidence to support the mutual combat instruction, he argued in issue II, *ante*, that there was insufficient evidence of premeditation and deliberation because the evidence was insufficient to show "that the fight that started as a fistfight was indeed a premeditated attempted murder."

broke the cell phone; and defendant walked away and headed to his truck and gave Moncada the opportunity to stop fighting.

The instruction did not mislead the jury, because if it believed defendant's account, it would have followed the instruction to find that Moncada became the aggressor when he escalated the fight by pulling the knife and advancing on defendant with it, even after defendant warned him to drop the knife, and defendant had the right to use the broken beer bottle in self-defense when Moncada tried to stab him.

We have already noted that defendant did not object to CALCRIM No. 3471. In addition, defense counsel expressly relied on the instruction in closing argument and asserted that if the jury found evidence of a mutual combat situation, then defendant had the right to defend himself when Moncada continued the fight by pulling the knife, because that left defendant "no choice" but to use the beer bottle in self-defense. Counsel further argued that defendant's injuries were "slight compared to Milton's. But it doesn't mean that he was the aggressor. It just means he won the fight."

While the instruction was supported by the evidence, the jury's verdict indicated that it did not believe any part of defendant's story. The instruction was not prejudicial and did not undermine defendant's claim of self-defense or reduce the prosecution's burden of proof.

VI. Prosecutorial Misconduct; Failure to Object

Defendant contends the prosecutor committed misconduct in three instances in closing argument by misstating the law and the facts, and improperly vouching for Moncada's credibility. Defendant concedes his attorney did not object to these portions of the prosecutor's closing argument but asserts he has not forfeited appellate review because the prosecutor's misconduct was "pervasive" and could not have been cured by any admonitions.

We begin with the well settled principles applicable to claims of prosecutorial misconduct. "A prosecutor is given wide latitude to vigorously argue his or her case and

to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 726; *People v. Dykes* (2009) 46 Cal.4th 731, 768.)

It is misconduct for a prosecutor to misstate the law or facts of the case, or personally vouch for the credibility of a witness. (*People v. Boyette* (2002) 29 Cal.4th 381, 433, 435.)

“When a prosecutor’s intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury. [Citation.]” (*People v. Panah* (2005) 35 Cal.4th 395, 462; *People v. Masters* (2016) 62 Cal.4th 1019, 1052.)

“When attacking the prosecutor’s remarks to the jury, the defendant must show that, ‘[i]n the context of the whole argument and the instructions’ [citation], there was ‘a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citations.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*).) The court must consider the challenged statements in the context of the argument as a whole to make its determination. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159.)

“As a general rule, ‘ “[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.” ’ [Citation.] The defendant’s failure to object will be excused if an

objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]” (*Centeno, supra*, 60 Cal.4th at p. 674.)

Defendant did not object to the portions of the prosecutor’s argument which he now contends were improper. “An objection and a request for admonition would have allowed the trial court to remedy any unfairness occasioned by the prosecutor’s argument, avoiding any potential harm. We perceive nothing in the record suggesting that an objection to any of the alleged instances of misconduct would have been futile. [Citation.]” (*People v. Boyette, supra*, 29 Cal.4th at p. 432.)

In the alternative, defendant contends his attorney’s failure to object constituted ineffective assistance. “ ‘A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel.’ [Citation.] ... [The defendant] bears the burden of showing by a preponderance of the evidence that (1) counsel’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficiencies resulted in prejudice. [Citations.]” (*Centeno, supra*, 60 Cal.4th at p. 674.)

“ ‘Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” ’ [Citation.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ‘ “ ‘no conceivable tactical purpose’ ” for counsel’s act or omission. [Citations.]’ [Citation.] ‘[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one’ [citation], and ‘a mere failure to object to evidence or argument seldom establishes counsel’s incompetence’ [citation].” (*Centeno, supra*, 60 Cal.4th at pp. 674–675.)

With this background in mind, we turn to defendant's claims of misconduct to determine if counsel was prejudicially ineffective for failing to object.

VII. Prosecutorial Misconduct; Circumstantial Evidence

Defendant asserts the prosecutor misstated the law by allegedly misleading the jury about direct and circumstantial evidence and undermining the defense reliance on CALCRIM No. 224 and the presumptions regarding circumstantial evidence.

Defendant's claims of misconduct are based on statements the prosecutor made during rebuttal argument. We will review the entirety of argument in order to place the prosecutor's statements in context.

A. *The Prosecutor's Initial Argument*

The prosecutor began his closing argument by referring the jury to CALCRIM No. 301, that the testimony of only one witness could prove any fact. The prosecutor argued that Moncada's trial testimony was more credible than defendant's version of the incident when "you start putting the physical evidence together and you start seeing the picture clearly." In support of Moncada's credibility, the prosecutor cited to his injuries, his testimony about how he received each one, the photographs of the injuries, and the photographs of the physical evidence found in the field including Moncada's shirt and sweatshirt, the broken beer bottle, and the tire tracks in the dirt.

The prosecutor next addressed the elements of attempted murder. The prosecutor explained the first element was that defendant took at least one direct but ineffective step toward killing another person. He argued defendant drove "to the middle of nowhere" and attacked Moncada. The prosecutor said the second element was that defendant intended to kill that person. He argued defendant had a plan to get Moncada into the truck by using the regular occurrence of paying the car insurance. Defendant had him sit in the backseat as a way to "control" the situation because Moncada "[c]ouldn't get away unless the Defendant chose to let him out of that car" and then drove him to the "middle of nowhere, a dirt field, no one around," and that was how he executed his plan.

The prosecutor then turned to the instruction that defined premeditation and deliberation: “So how do we know he deliberated and how do we know he premeditated? Once again, *go back to the plan*. He put this plan in action and it started to work. He got Mr. Moncada over, got him into a vehicle that he couldn’t get out of, doing something that wouldn’t raise eyebrows, and they ended up in the middle of nowhere for no reason.” (Italics added.)

The prosecutor argued there was an “[o]bvious motive” because defendant was upset about the situation with his wife and had time “to stew about hat and put this plan into action,” and cited the “relentlessness” of his attack on Moncada. “When you look at the evidence and all the surrounding circumstances, the Defendant planned this attack. He deliberated about it, he premeditated it...”

B. Defense Counsel’s Closing Argument

Defense counsel argued defendant’s testimony was more credible than Moncada’s account, and there was no evidence that he intended to kill or of planning or premeditation. Defense counsel went through every aspect of the testimony from Moncada and defendant, pointed out inconsistencies in Moncada’s story, and asserted that defendant’s testimony and explanation how Moncada attacked him with the knife were consistent with the injuries on his left hand.

At the end of her closing argument, defense counsel stated:

“So during voir dire, I think it was [the prosecutor] that was telling you about circumstantial evidence and direct evidence. And direct evidence is just as good, if not equal to circumstantial evidence. And [the] judge gave an example when he was reading the instructions. Direct evidence is you visualize it. So if it’s raining outside, someone gets wet, if you’re asked why they’re wet, you can say I saw them get rained on, because you saw that directly.

“Circumstantial is you’re sitting in here and someone comes in through the door with an umbrella, a raincoat, and they’re soaking wet. Based on those circumstances, you can conclude – I wish it was raining outside—but you can conclude that it was raining.

“And if you have a situation where you have circumstantial evidence, and you have two interpretations of it, one pointing to guilt and one pointing to innocence, that instruction tells you, and I think it’s [CALCRIM No.] 224 that tells you that *you must accept the one that points to innocence.*” (Italics added.)

C. The Prosecutor’s Rebuttal Argument

Defendant’s claim of misconduct is based on the following italicized statements made by the prosecutor when he began his rebuttal argument, and referred to defense counsel’s discussion about direct and circumstantial evidence:

“At the end, [defense counsel] talked about direct and circumstantial evidence. And part of that was if there’s two reasonable conclusions, you must go with the one that points to not guilty. She kind of just left that out there without really talking about it.

“It’s true, however, what is this case mainly – what types of evidence do we have? Well, there’s direct and circumstantial. *The majority of the evidence in this case is direct evidence, no matter whose story you believe. Mr. Moncada said I saw the Defendant do this. Saw him do that. I did this. That’s all direct evidence.* He’s not connecting the dots. Really, the only thing he’s connecting the dots about is where the beer bottle was broken. He didn’t see the Defendant break it, but he heard it break. That’s really the only circumstantial evidence that Mr. Moncada is talking about.

“Same thing with the Defendant’s story. I saw Milton [Moncada] do this. I did this. The majority of this case is direct evidence. *So this instruction, yes, it’s the law, but the majority of this case is direct evidence. So you don’t need to make that weighing decision, in terms of two reasonable conclusions.*” (Italics added.)

The prosecutor again argued that Moncada’s story was credible, it was corroborated by the physical evidence of his injuries and the items found in the field, and Moncada’s testimony proved the charged offenses.

D. The Instructions

The jury received CALCRIM No. 301, that the testimony of only one witness can prove any fact.

The jury was given CALCRIM No. 223, that facts may be proven by direct or circumstantial evidence or a combination of both, and neither was necessarily more reliable than the other or entitled to greater weight than the other.

The jury was also given CALCRIM No. 224 on circumstantial evidence: “Before you may rely on circumstantial evidence to conclude that a fact necessary to find the Defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the Defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the Defendant is guilty. *If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.*” (Italics added.)

E. Analysis

Defendant contends the prosecutor misstated the law about circumstantial evidence in his rebuttal argument, as italicized above. Defendant argues the weakest part of the People’s case was based on speculation about premeditation and deliberation, and the prosecutor’s rebuttal argument misled the jury into believing that there was direct evidence of these factors. Defendant asserts the prosecutor’s argument allowed the jury to reject any inferences in favor of the defense as provided in CALCRIM No. 224.

Defense counsel was not prejudicially ineffective for failing to object to this portion of the prosecutor’s rebuttal argument. Based on the entirety of the argument, the prosecutor did not misstate the law about direct and circumstantial evidence. Instead, the prosecutor was making fair comments on the People’s view of the evidence. The prosecutor correctly cited the instruction that the testimony of one witness was sufficient to prove a fact and acknowledged that CALCRIM No. 224 on circumstantial evidence

was a correct statement of the law. The prosecutor's rebuttal argument did not refute the correctness of the jury instruction, but instead challenged the defense argument that the case relied on circumstantial evidence. The prosecutor asserted the People's view that Moncada's trial testimony was credible and corroborated by the physical evidence in the case. The prosecutor further argued Moncada's testimony was direct evidence about what happened in the field, and his description of the incident proved defendant's intent to kill, and his planning and motive for premeditation. The prosecutor was entitled to set forth his arguments about the evidence in support of the charged offenses, and he did not misstate the law in doing so.

VIII. Prosecutorial Misconduct; Great Bodily Injury Enhancements

Defendant next contends the prosecutor misstated the law about the type of injuries that would support the great bodily injury enhancements and misstated the facts when he said Moncada required a "lengthy" hospital stay for treatment of those injuries. We again turn to the entirety of the argument to address his contentions.

A. Background

As noted in issue VI, *ante*, the prosecutor argued Moncada's story was credible. It was corroborated by his testimony about defendant inflicting each injury on his body and by the photographs of those injuries. In doing so, the prosecutor listed several of these injuries:

"[T]he cut to his eye that required stitches. You can see the bruising to his face. Mr. Moncada told you how he received each and every one of these injuries. And on the face was pretty much the unbroken beer bottle and the punching [and] kicking.... Same thing with his ear and his leg. [¶] The injury to his right hand, we have the stitches going across the three fingers. He said that was from where he blocked the knife or box cutter. Strangulation marks. [¶] And then you get into the broken beer bottle injuries. There's quite a few of these. The injuries – cuts to his back and side."

When the prosecutor addressed the enhancements, he cited the instruction that said great bodily injury meant a significant or substantial injury. The prosecutor argued

Moncada's testimony and the photographs supported the great bodily injury enhancements:

“[A]n injury that is ... greater than minor or moderate harm. Well, look at Mr. Moncada's injuries altogether. Extensive stitching, some mark gashes, bruising, heavy swelling. Yeah, those injuries are more than mild or moderate harm. [¶] When you think of mild, what do you think of? *A paper cut. Moderate, sprained ankle, maybe.* He had to be transported to the hospital and *had to get a lengthy hospital stay*, based upon his own testimony, to get treated for all of those injuries.” (Italics added.)

In her closing argument, defense counsel argued defendant used reasonable force when Moncada attacked him with the knife, and defendant was injured when he pulled the knife out of Moncada's hand. “Does he scratch [Moncada] up? Heck yeah. You all see the photographs. They're horrendous. They're horrible. And I'll talk about those in a second[.]”

Defense counsel argued the photographs of Moncada's injuries were better than the pictures of defendant's arm “because they had determined that [Moncada] was the victim in this case.” Counsel further stated “And, again, his injuries are slight compared to Milton's. But it doesn't mean that he was the aggressor. It just means he won the fight.”

B. Analysis

Defendant argues the prosecutor made a “significant” misstatement of the “legal parameters of great bodily injury” by arguing Moncada's injuries were “more than mild” when compared to a paper cut or a sprained ankle. In making this argument, defendant cites to numerous cases involving injuries found to satisfy the enhancement and, as in issue III, *ante*, renews his argument that Moncada's injuries only resulted in “slight scarring” and were not “substantial” within the meaning of section 12022.7.

The prosecutor did not misstate the law or definition of great bodily injury. As discussed in issue III, *ante*, the jury was correctly instructed that great bodily injury meant “significant or substantial injury. It is an injury that is greater than minor or moderate harm.” As we also discussed above, a jury “very easily” could find a broken

nose constitutes great bodily injury as a matter of fact if it “results in a serious impairment of physical condition” (*People v. Nava, supra*, 207 Cal.App.3d at pp. 1497–1498), and “[a]brasions, lacerations, and bruising can constitute great bodily injury. [Citation.]” (*People v. Jung, supra*, 71 Cal.App.4th at p. 1042; *People v. Washington, supra*, 210 Cal.App.4th at pp. 1047–1048.)

Defendant further argues the prosecutor misstated the facts when he argued that Moncada “had to be transported to the hospital and *had to get a lengthy hospital stay, based upon his own testimony*, to get treated for all of those injuries.” (Italics added.) As defendant correctly notes, there was no evidence Moncada was admitted to the hospital. Instead, Moncada testified that he was taken to the hospital, arrived there around 1:00 p.m., received treatment, diagnostic tests, and sutures for the injuries on his body. He was there until his family picked him up, around 10:00 p.m. on the same day. However, the prosecutor made these statements by expressly referring to Moncada’s trial testimony about how he was treated at the hospital. The jury was instructed that it “must decide what the facts are” based on the evidence presented at trial, and “[n]othing that the attorneys say is evidence,” including their remarks during closing argument.

As we have explained, defense counsel did not object to this portion of argument. If she had done so, the court could have directed the prosecutor to clarify his factual statements or reminded the jury that the attorneys’ arguments were not evidence. In evaluating defense counsel’s failure to object, “deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) Defense counsel may have decided not to challenge the nature of defendant’s injuries particularly since she agreed that Moncada’s injuries were “horrendous” and “horrible,” and instead argued the injuries were consistent with defendant’s own attempts to defend himself when Moncada allegedly assaulted him with the knife.

IX. Prosecutorial Misconduct; Vouching

Finally, defendant asserts the prosecutor improperly vouched for Moncada's credibility because he argued that only defendant had a motive to lie since he was the only person with an interest in the outcome of the case. Defendant's claim of misconduct is based on statements the prosecutor made in rebuttal argument. We will review the entirety of the parties' arguments on this particular subject and then address defendant's appellate contention.

A. The Prosecutor's Initial Argument

As noted above, the prosecutor argued the testimony of one witness was sufficient to prove a fact, and that Moncada's testimony was credible compared to defendant's account because it was corroborated by the physical evidence of injuries and the items found in the field.

The prosecutor acknowledged Moncada lied to the police when he initially talked to the officer at the hospital. The prosecutor argued Moncada made the false statements because defendant had just threatened to kill him if he told the police what happened. The prosecutor explained defendant's threats were the basis for count 3, intimidating a witness. The prosecutor further argued that once Moncada saw his family that night, he knew they were safe, so he went to the police department and told the officers what happened to him.

The prosecutor argued that defendant's self-defense claims were not credible based on the multiple injuries on Moncada's body that were inflicted by defendant when he attacked him with the beer bottle and the box cutter. The prosecutor noted that while defendant had injuries on his left arm, he claimed the injuries were primarily work-related.

The prosecutor argued that three deadly weapons had been alleged to support both the personal use enhancement and the assault charge in count 2: the broken beer bottle, the truck, and the box cutter. As for the truck, the prosecutor argued Moncada testified

he was hit by the truck, and a truck could be a deadly weapon “if ... you run someone over.... [¶] He was driving the vehicle when he struck Mr. Moncada.”

B. Defense Counsel’s Argument

In her closing argument, defense counsel attacked Moncada’s credibility because he lied when defendant confronted him about his relationship with his wife. Moncada also lied when he talked to the police at the hospital, and his injuries were inconsistent with his story about how defendant allegedly assaulted him with the beer bottle and the box cutter.

Defense counsel further attacked Moncada’s credibility about being hit by the truck. Moncada had previously testified the right side of the truck hit his right side, but by the time of trial, “he’s like, ‘Oh, shoot. That doesn’t make sense. It’s got to be the left side of the truck and my right side,’ and, conveniently, he changes his testimony.” Counsel argued Moncada’s claim that the truck was going 30 to 40 miles an hour was not credible: “And what I’d like to know is where is that nasty bruise from being hit, struck by that truck at 30 to 40 miles per hour? It’s not there because it didn’t happen.”

Defense counsel referred the jury to CALCRIM No. 226, about how to evaluate the credibility of witnesses, and addressed several of the listed factors, including whether the witness had a bias or personal relationship or personal interest, and whether a witness deliberately lied. Counsel argued that if the jury found a witness deliberately lied about something significant in the case, “you should consider not believing anything that witness says.”

C. The Prosecutor’s Rebuttal

In rebuttal, the prosecutor acknowledged Moncada previously testified the truck was going 30 to 40 miles an hour when it hit him. The prosecutor argued that Moncada “[p]robably felt like it was going 30 to 40 miles an hour. Probably not realistic, though.” The prosecutor also acknowledged Moncada’s inconsistent statement about how the truck hit him. The prosecutor argued that “a lot gets lost” using an interpreter for his

testimony, and “we had to clarify numerous times” Moncada’s testimony about which side he was hit on.¹⁴

The prosecutor again acknowledged that Moncada “definitely lied” when he initially talked to the police at the hospital but argued he did so “with good reasons” because defendant had just tried to kill him and threatened to kill him if he talked to the police. “The time frame supports [Moncada]. They went straight from the hospital back to the police department. Why do that? Well, [he] explained why. His family was safe. They could get help from law enforcement.”

The prosecutor rejected defense counsel’s argument that Moncada deliberately lied about how and where he was injured with the box cutter. He referred the jury to the instruction about how to evaluate the credibility of witnesses and that it was up to the jury to determine their truthfulness and credibility.

“The bottom one there [referring to the factors listed in the instruction] ... was the witness’s testimony influenced by a factor such as bias, prejudice, a personal relationship with someone involved in the case, or personal interest in how the case is decided? *Well, the only person that that factor really applies to is the Defendant. Clearly, he has an interest in how this case is decided.*” (Italics added.)

D. Analysis

Defendant cites the italicized portion of the prosecutor’s rebuttal argument and asserts the prosecutor improperly vouched for Moncada’s credibility and misstated the facts and law. Defendant argues that compared to his own alleged bias, Moncada had multiple reasons to lie since “he had been humiliated in a fight in which he lost that was precipitated by flirting with his uncle’s wife, while in a live-in relationship with another woman,” Moncada admitted he lied to the police in his first statement, which was “actionable as filing a false report,” and Moncada had a motive to “stick with his second

¹⁴ Moncada testified at trial through an interpreter.

story, which even the prosecutor acknowledged was not realistic as least as far as being hit by a truck traveling at 30 miles per hour,” but the prosecutor “trivialized this lie.”

“A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness’s truthfulness at trial. [Citation.] However, so long as a prosecutor’s assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the ‘facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,’ her comments cannot be characterized as improper vouching. [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 971; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269–1270; *People v. Turner* (2004) 34 Cal.4th 406, 432–433; *People v. Stansbury* (1993) 4 Cal.4th 1017, 1059, revd. on other grounds sub nom. *Stansbury v. California* (1994) 511 U.S. 318.)

The prosecutor did not cite to any evidence outside the record or personally vouch for the credibility of Moncada’s testimony. Instead, he argued Moncada’s account of what happened in the field was credible when compared to defendant’s testimony and corroborated by Moncada’s description of how defendant inflicted each injury, the photographs of his injuries, and the items found at the crime scene, including Moncada’s shirt and sweatshirt and his broken cell phone.

The prosecutor’s assertions that defendant’s story was not credible and that he had a motive to lie about what happened constituted fair argument. There was evidence of defendant’s prior inconsistent statements after he was arrested about how his left arm was injured, washing the blood out of his truck, and throwing away his own blood-stained clothing.

Defendant’s claim of misconduct is based upon his own interpretation of the evidence and Moncada’s alleged motives to lie. As noted by the People, however, a

prosecutor does not commit misconduct by urging the jury to draw inferences different from the defense theory of the case. (*People v. Young, supra*, 34 Cal.4th at p. 1191.) “It is not ... misconduct to ask the jury to believe the prosecution’s version of events as drawn from the evidence.” (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) “The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence ... [and] to argue on the basis of inference from the evidence that a defense is fabricated” (*People v. Pinholster* (1992) 1 Cal.4th 865, 948; *People v. Boyette, supra*, 29 Cal.4th at p. 433.) Defense counsel had already argued that Moncada had a motive to lie because he was caught in the conflicting statements about how the truck hit him.

We thus conclude that the prosecutor did not commit misconduct, and defense counsel was not prejudicially ineffective for failing to object to these portions of closing argument.

DISPOSITION

The judgment is affirmed.

POOCHIGIAN, J.

WE CONCUR:

LEVY, Acting P.J.

MEEHAN, J.